



Department of Justice

PROTOCOL FOR INCREASED STATE PROSECUTION OF CRIMINAL ANTITRUST OFFENSES

The Antitrust Division of the United States Department of Justice is announcing a new protocol for increased state prosecution of criminal antitrust offenses. The Department has developed a program for increased prosecution by State Attorneys General of some criminal antitrust matters that have been previously prosecuted by the United States. This protocol defines the circumstances where the Antitrust Division of the United States Department of Justice ("Division") may transfer prosecutorial responsibility, including the relevant evidence, for certain antitrust offenses to State Attorneys General.

This protocol is based on the following principles:

1. The effective criminal prosecution of certain antitrust offenses having particularly local impacts shall not be compromised;
2. The traditional role of States as the treble damage plaintiff on behalf of state and local governmental purchasers of goods and services shall not be undermined;
3. The criminal prosecution of certain antitrust offenses having particularly local impacts shall, wherever appropriate, be conducted by the State Attorney General for the affected locality; and
4. Any transfer of prosecutorial responsibility under this protocol shall be undertaken at the earliest practicable point in the development of that matter.

In general, this procedure will be implemented for offenses including, but not limited to, bid rigging and/or price fixing in localized markets. The Division's willingness to forebear criminal prosecution of a particular matter in favor of a State Attorney General would in large part depend on the Division's understanding that:

- (1) the State Attorney General has the legal and personnel resources to undertake the criminal prosecution; and
- (2) the State Attorney General is willing to undertake the criminal prosecution.

Wherever the foregoing conditions are met and the offense has an appropriate local impact, the Division will, to the extent permitted by law and Division policy, transfer to that State Attorney General all of the evidence and other materials in its possession relevant to the offense. Such transfer of evidence will include requesting any required court orders pursuant to Fed. R. Crim. P. 6(e)(3)(C)(iv) permitting the State Attorney General's access to federal grand jury materials for the purpose of state criminal law enforcement. Nothing contained herein, however, precludes the Division from initiating its own prosecution.

Circumstances may arise where a particular State Attorney General either lacks the authority to criminally prosecute antitrust offenses under state law or the available criminal remedies under state law are comparatively inadequate. In such cases, personnel from the State Attorney General's office may be considered for appointment to assist Division attorneys in the prosecution of appropriate local impact cases for the United States under the supervision and direction of the Division. These appointments will be made under the guidelines developed by the Division.

For purposes of this protocol, such an appointment does not necessarily require the State to forebear from using the same attorney as counsel in any follow-up civil, treble damage litigation prosecuted on behalf of the victims of the offense he/she prosecuted criminally for the United States; provided, however, that any such follow-up state litigation will not be initiated prior to (1) the conclusion of the Division's criminal proceedings, and (2) the issuance by the court in the relevant jurisdiction of any required orders pursuant to Fed. R. Crim. P. 6(e).

When necessary to preserve a claim from the running of the statute of limitations, nothing contained in the foregoing shall prevent a State Attorney General from filing such follow-up state litigation prior to the conclusion of the Division's criminal proceedings provided: any attorney appointed to assist the Division in the criminal proceeding shall have no involvement in such follow-up state litigation prior to the conclusion of the Division's criminal proceedings; and such State Attorney General has not relied, directly or indirectly, upon any matter occurring before the grand jury, absent an order pursuant to Fed. R. Crim. P. 6(e), in the preparation or prosecution of any such follow-up state litigation.

Particular cases may arise where the scope of the offense to be charged has localized impacts in more than one state, for example, bid rigging on school construction contracts let by school districts in adjacent states. If the Division decides to transfer such matters, the Division, in consultation with the affected Attorneys General, will decide which state(s), if any, should undertake such prosecution(s).